

ATTACHMENT C



CENTER for BIOLOGICAL DIVERSITY

Because life is good.

January 8, 2019

VIA ELECTRONIC MAIL

U.S. Army Corps of Engineers
Office of the Chief Counsel
ATTN: FOIA public Liaison
441 G Street N.W.s
Washington DC 20314-1000
foialiasion@usace.army.mil

Re: FREEDOM OF INFORMATION ACT APPEAL: ACOE-2018-0331 (Formosa Ethane Cracker)

Dear FOIA Officer:

On behalf of the Center for Biological Diversity (“Center”), I appeal the U.S. Army Corps of Engineers’ (“the Corps”) final determination on the Center’s referenced request for records pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”), assigned FOIA request number ACOE-2018-0331 (“FOIA request”). Based upon all available evidence, the Corps failed to conduct an adequate search for the responsive records. For the reasons set forth below, the Corps’ withholding of the responsive records violates FOIA.

You have 20 working days to respond to this appeal. You are advised that the Center intends to pursue legal action if the Corps does not search for and disclose the responsive records immediately, in accordance with FOIA’s disclosure mandate and federal policies.

FACTUAL BACKGROUND ABOUT THE CENTER’S FOIA REQUEST

On September 11, 2018 the Center submitted to the Corps New Orleans District a request pursuant to FOIA. Attachment A (The Center’s September 11, 2018 FOIA Request). In that request, the Center sought:

From January 27, 2018 to August 27, 2018, FG LA LLC’s applications for permits under Section 404 of the Clean Water Act, 33 U.S.C. §§ 1251-1387 (“CWA”) and Section 10 of the Rivers and Harbors Act, (33 U.S.C. § 403 (“RHA”) for the proposed “Sunshine Project” ethane cracker in Formosa, St. James Parish, Louisiana.

Id.

On October 11, 2018 the Center sent the Corps a letter putting the agency on notice for its statutory deadline violation and offering to assist. Attachment B (The Center's October 11, 2018 Notice of Deadline Violation Letter).

On October 16, 2018 the Corps sent the Center its Final Determination Letter. Attachment C (The Corps' October 16, 2018 Final Determination Letter). In that letter, the Corps stated "[a]fter a diligent search of the official records of the New Orleans District, USACE, records responsive to your request were located, reviewed and deemed releasable in their entirety, with some personal information redacted. The records are attached to this communication." *Id.* That same day, the Center sent the electronic mail requesting "the seven hyperlinked pdfs located in step 13 the Maps and Drawing Instructions" and "the comments related to the project indicated in the hyperlink on the seventh page." Attachment D (The Center's November 8, 2018 Missing Record Email Chain).

On October 17, 2018 the Corps sent the Center electronic mail with instructions for accessing the Corps' records. Attachment D.

On November 8, 2018 the Center sent the Corps electronic mail requesting the missing Alternative Analysis attachment record. Attachment D.

On December 10, 2018 the Center sent the Corps electronic mail again inquiring about the missing Alternative Analysis attachment record. Attachment D.

On December 10, 2018 the Corps sent the Center electronic mail with instructions for accessing the missing record. Attachment D.

On December 17, 2018 the Center sent the Corps electronic mail requesting that the Corps provide the Center with appeal rights information, which the agency did not include in its Final Determination Letter. Attachment E (The Center's December 17, 2018 Appeal Rights Email Chain). That same day, the Corps sent the Center electronic mail stating that:

Our response letter did not outline any appeal information because nothing was denied. The requested records were provided. I am puzzled by your inquiry as I have not received any contact to the contrary. If you believe our response was not complete and we have stated it is, your first contact should be with us.

Id. That same day, the Center sent the Corps electronic mail stating the reasons for the Center's forthcoming appeal. *Id.*

As such, the Center challenges the adequacy of the Corps' search.

THE FREEDOM OF INFORMATION ACT

The purpose of FOIA is to "open agency action to the light of public scrutiny." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976). Former President Obama reinforced FOIA's strong presumption of disclosure with regard to all FOIA decisions. *See Presidential Memorandum for*

Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) (directing agencies to administer FOIA under a presumption that guidelines that reinforce a commitment to open government, encouraging federal agencies to both “make discretionary releases of information” and to “make partial disclosures” when an agency determines full disclosure is not possible. *Former Attorney General Eric Holder’s Memorandum for Heads of Executive Departments and Agencies* (Mar. 19, 2009). In his memo, the Former Attorney General also announced a “foreseeable harm” standard for defending agency decisions to withhold information under FOIA. *Id.* Thus, the DOJ will defend an agency’s denial of a FOIA request “only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.” *See id.* These authorities remain in effect.

FOIA “mandates a policy of broad disclosure of government documents” and carries a strict disclosure mandate that requires federal agencies to expeditiously disclose requested records to requesters. *See* 5 U.S.C. § 552; *Church of Scientology v. Dep’t of the Army*, 611 F.2d 738, 741 (9th Cir. 1980). Consequently, any inquiry under FOIA brings with it a “strong presumption in favor of disclosure.” *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991).

To that end, nothing in FOIA should be read to “authorize withholding of information or limit the availability of records to the public, except as specifically stated.” 5 U.S.C. § 552(c). Congress recognized that in certain limited instances, records may be exempt from FOIA’s broad disclosure mandate, and thus created nine categories of exemptions. *Id.* § 552(b). These exemptions, however, “must be narrowly construed in light of FOIA’s dominant objective of disclosure, not secrecy.” *Maricopa Audubon Soc’y v. U.S. Forest Serv.*, 108 F.3d 1082, 1085 (9th Cir. 1996). Accordingly, because FOIA carries a presumption in favor of disclosure, and indeed, because “FOIA requesters face an information asymmetry given that the agency possesses the requested information and decides whether it should be withheld or disclosed,” *COMPTTEL v. U.S. Federal Comm’n Comm.*, 910 F. Supp. 2d 100, 111 (D.D.C. 2012) (internal citations omitted), agencies bear the burden of justifying the withholding of any records that are responsive to a FOIA request. 5 U.S.C. § 552(a)(4).

An agency must provide “a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.” *See King v. Dept. of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987) (agency must provide); *see also Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (holding an agency’s disclosure of “who wrote the [document], to whom it was addressed, its date, and a brief description” was “patently inadequate” to establish exemption under FOIA).

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

DISCUSSION

I. THE CORPS DID NOT CONDUCT AN ADEQUATE SEARCH FOR THE RESPONSIVE RECORD.

Based on the Corps' failure to provide records responsive to the Center's FOIA request, it is clear that the Corps failed to conduct an adequate search for the responsive record.

To achieve FOIA's core purpose of disclosure, an agency must perform an adequate search for responsive records. *Founding Church of Scientology v. NSA*, 610 F.2d 824, 837 (D.C. Cir. 1979). Upon receiving a FOIA request, federal agencies are "required to perform more than a perfunctory search" to identify records that are responsive to the request. *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 514 (D.C. Cir. 2011). An agency must demonstrate "a 'good faith effort to conduct a search using methods which can be reasonably expected to produce the information requested.'" *DiBacco v. U.S. Army*, 795 F.3d 178, 188 (D.C. Cir. 2014) (quoting *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)) (internal alterations omitted); *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. U.S. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)) (to meet this burden, the agency must "demonstrate beyond material doubt that its search was 'reasonably calculated to uncover all relevant documents'").

In addition, "agency affidavits must explain in reasonable detail the scope and method of the search conducted by the agency" for the agency to "satisfy its burden of establishing the adequacy of its search." *Nat'l Sec. Counselors II v. Cent. Intelligence Agency*, 960 F. Supp. 2d 101, 152 (D.D.C. 2013); *Ancient Coin Collectors Guild v. Dept. of State*, 641 F.3d 504, 514 (2011) (internal quotation omitted) (agency may meet its burden by submitting "[a] reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched"). A court will apply "a 'reasonableness' test" to assess whether an agency's search for responsive records was adequate. *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 27 (D.C. Cir. 1998). This reasonableness test is "consistent with congressional intent tilting the scale in favor of disclosure." *Id.*

Here, the evidence suggests that the Corps failed to conduct an adequate search for the responsive records. *Founding Church of Scientology*, 610 F.2d at 837. The Corps' Final Determination Letter lacks any reasonable detail concerning the scope and method of the search it conducted. Attachment C; *Nat'l Sec. Counselors II*, 960 F. Supp. 2d at 152; *Ancient Coin Collectors Guild*, 641 F.3d at 514. The Corps' letter did not establish that it made a good faith effort to conduct a search for the requested record, and it failed to prove that it used methods that can be reasonably expected to produce the requested records. Attachment C; *Oglesby* at 920 F.2d at 68. In that letter, the Corps merely stated that "After a diligent search of the official records of the New Orleans District, USACE, records responsive to your request were located, reviewed and deemed releasable in their entirety, with some personal information redacted." Attachment C. In fact, nowhere in HHS's Final Determination Letter did the Corps provide search terms or a description of the search. *Id.* Based upon the information the Corps provided in its Final Determination Letter, it is simply not reasonable to conclude that the Corps conducted a search that was reasonably calculated to find all records that are responsive to the Center's FOIA request. *Id.*

The Center requested records from the Corps pertaining to CWA's Section 404 dredge-and-fill permit application. 40 CFR § 230 *et seq.* Section 404 guidelines require that the Corps identify the least environmentally damaging practicable alternative, 40 CFR § 230.7(b)(1); determine that appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem, 40 CFR § 230.10(d); and make detailed factual determinations as to the potential environmental effects of proposed discharges 40 CFR §§ 230.11, 230.12(b). The records the Corps released to the Center do not contain sufficient information upon which to base these requisite determinations.

Furthermore, on September 10, 2018 the Center spoke via telephone with Neil Gauthier, the Corps Project Manager assigned to this project. The Center inquired about how to obtain the permitting application, and Mr. Gauthier reported that the Corps cannot provide the permit application, citing a broad policy of protecting industry secrets. As such, Mr. Gauthier suggested that the Center submit a FOIA request to the Corps for the records. However, in the Corps' Final Determination Letter, the agency instructed the Center to access the Coastal Use Permit Application from the Louisiana Department of Natural Resources website. *Id.* The Corps did not make any redactions to this Coastal Use Permit Application. *Id.* The Coastal Use Permit Application that the Corps produced in response to the FOIA request was already publicly available on the Louisiana Department of Natural Resource's website when the Center telephoned Mr. Gauthier, indicating either that the Corps has neglected to inform the Center that it has withheld certain records pursuant to an industry secrets exemption or that the Corps has failed to perform an adequate search

In addition, without a description of the methods that were used to search for the records responsive to the Center's FOIA request in its Final Determination Letter, it is impossible to determine whether the Corps conducted an adequate search for the Corps' records. Attachment C. To remedy this, the Corps must conduct an adequate search for the responsive records, release them immediately, and provide adequate detail about the search methods that it utilized. Additionally, because the Center believes there may be further evidence of the Corps' inadequate search, the Center reserves its right to pursue any such additional records once it receives additional records from the Corps and has an opportunity to review them.

Thus, based on available information, the Corps failed to conduct a search that is reasonably expected to produce all of the requested responsive records.

II. CONCLUSION

As described above, the Corps violated FOIA by failing to conduct an adequate search for the responsive records concerning the Formosa Ethane Cracker's application for Clean Water Act permits. Accordingly, the Corps must conduct an adequate search for the responsive records and produce both the responsive records and a catalogue of its search methods immediately. In so doing, the Corps must also provide an estimated date of completion of its release of the record. 5 U.S.C. § 552(a)(7)(B).

We expect your timely resolution of this matter. Do not hesitate to contact me with any questions regarding this appeal. Please contact me at foia@biologicaldiversity.org. The records and any related correspondence should be sent to the address below.

Sincerely,

A handwritten signature in black ink, appearing to read "Margaret E. Townsend", with a stylized flourish at the end.

Margaret E. Townsend
Open Government Staff Attorney
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211-0374
foia@biologicaldiversity.org

Attachments

Attachment A (The Center's September 11, 2018 FOIA Request)
Attachment B (The Center's October 11, 2018 Notice of Deadline Violation Letter)
Attachment C (The Corps' October 16, 2018 Final Determination Letter)
Attachment D (The Center's November 8, 2018 Missing Record Email Chain)
Attachment E (The Center's December 17, 2018 Appeal Rights Email Chain)